

## Improving the Protection of Wild Mammals in Scotland

### 1. Features of Language in the Act

Please see section 5 of Lord Bonomy's report.

<http://www.gov.scot/Publications/2016/11/9965/5>

1.1. Do you think the definition of "to hunt" as provided in the 2002 Act should be more specifically defined?

Please answer Yes  or No

SLE notes the difficulties alluded to in Lord Bonomy's report regarding framing a satisfactory comprehensive definition of hunting. We are of the view that in all the circumstances the current definition is sufficient and would caution that any attempt to redefine hunting risks omission with consequent problems. SLE is also unaware of enforcement of the law being hindered by the current definition, which includes "to course" thereby covering hunting by sight as well as scent. Recent wildlife crime statistics from December 2017 would appear to support the view that prosecutions are being brought forward under current legislation and the law has been understood and applied.

1.2. Do you agree with Lord Bonomy's suggestion that the word "deliberately" in section 1(1) serves no useful purpose?

Please answer Yes  or No

Please explain your answer

SLE would strongly object to the removal of this term with no replacement as it does serve a purpose. At a very basic level the usage of the word "deliberate" offers reassurance to those dogwalkers whose dogs may search for, flush or pursue wild mammals but where this was merely accidental. This should be borne in mind in the context that in Scotland, unlike England, "to hunt" explicitly includes the activity of searching in the definition, so it is vital that the legislation is clear. The inclusion of the word "deliberately" makes clear that it must be fully intended and not simply meet some lower threshold. We are unaware of any problems caused by usage of the term "deliberate".

1.3. Do you think the Act would be clearer if “searching” was included alongside “stalking” and “flushing” in section 2(1)?

Please answer Yes or No X

Please explain your answer

We note that “searching” is included in line 2 of section 2(1) but is not included in either the title of Section 2 nor in lines 3 or 4. However, we do also recognise that the entire activity of “to hunt” includes searching and on a practical level to stalk or flush an animal one must find the presence of the wild mammal. A dog is not able to flush something out unless it has found it.

1.4. Is “searching” relevant to any other subsections?

Please answer Yes or No x

Please explain your answer

SLE regard “searching” as being included in the term “to hunt” and as a matter of logic do not see any need to incorporate hunting in further subsections per our response to 1.3.

1.5 Do you think the Act would be improved if it included definitions of

“to stalk”

Please answer Yes or No x

“to search”

Please answer Yes or No x

“to flush”

Please answer Yes or No x

1.6. What elements would you wish to see included in these definitions?

Please explain your answer

SLE does not believe a substantive case has been made for these terms to be defined and is unaware of any problems interpreting or applying the law. Arguably it would be better for interpretation of these activities to be defined by the courts and clarified over time and from experience. We believe the courts have to date taken a common sense view and there is a risk of complicating cases by additional definitions, which in practice are not significant matters in individual cases which are based on their own circumstances and none of these actions are in themselves

sufficient to permit conduct to be deemed to fall within the offence.

1.7. Do you think section 2(3) should be framed more narrowly to remove any overlap with section 2(1) by removing reference to using a dog under control to flush a fox from an enclosed space within rocks or other secure cover above ground?

Please answer Yes  or No

Please explain your answer

We recognise that there is overlap between section 2(1) and 2(3). The suggested change seems reasonable as long as it is only to remove this overlap and possibly to remove the unnecessary condition with respect to being a firearm or shot gun certificate holder (see 1.10 below.).

1.8. Do you think that the various areas of overlap and inconsistency between sections 2(1), 2(3), 3(a) and 5 of the Act should be addressed in the manner suggested?

Please answer Yes  or No

Please explain your answer

We recognise that there are areas of overlap and inconsistency, especially with respect to “once it is safe to do so” (2(1)) and “as soon as possible” (2(3)(b) and 3(a) and the wording in section 5. We support the suggested clarification and the use of “as soon as possible” throughout on the clear understanding that, “Any court would inevitably read that requirement as subject to it being safe to shoot.” (5.31)

1.9. Do you think the “lawful means” mentioned in section 2(2) should be specified?

Please answer Yes  or No

Please explain your answer

We do not feel that “lawful means” should be specified because the only lawful means would be shooting, snaring or killed by a bird of prey. Snaring is not relevant in this context and as there is no impact on clarity or ability to prosecute we do not see reason to specify further.

1.10. Do you think there are any other inconsistent, inappropriate or unnecessary features in the Act which could be improved, or do you think there are any terms in the Act which have not been covered above and should be addressed or have been omitted from the Act and should be included? Please identify them and suggest ways in which they might be addressed.

Please explain your answer

Section 2(3) does require the person using a dog under control to be in possession of a firearm and hold a valid firearms or shot gun certificate.

Section 2(1) does not contain a comparable condition. When consideration is given to reframing section 2.3 we would suggest deletion of this requirement since the person is using a dog under control and may not be one of the “guns”.

The requirement for those shooting stalked or flushed mammals in Section 3 to be in possession of a valid certificate or visitor’s permit remains valid.

## 2. Terriers

Please see paragraphs 6.20 to 6.30 of Lord Bonomy's report.

<http://www.gov.scot/Publications/2016/11/9965/6>

2.1. Do you agree with Lord Bonomy's suggestion that the legislation should impose a restriction in line with the Code of Conduct of the National Working Terrier Federation that, wherever possible and practical, only one terrier should be entered to ground at a time?

Please answer Yes  or No

Please explain your answer

It is noted that the NWTF Code of Conduct has been adopted by the Scottish Hillpacks Fox Control Association and that each of the mounted hunts require their terriermen to adhere to this Code of Conduct. The Code recommends that, where possible and practical, only one terrier should be entered to ground at any time. It is therefore sensible that the Act should reflect this, as does in Section 5(3) for the dispatch of orphaned fox cubs.

This would also introduce some consistency with the 2004 Act in England and Wales and with BASC's Code of Practice on The Use of a Dog Below Ground in England and Wales -

<https://basc.org.uk/cop/use-of-a-dog-below-ground-in-england-and-wales/>

## 3. Mental State Required for Illegal Hunting

Please see paragraphs 7.15 to 7.22 of Lord Bonomy's report.

<http://www.gov.scot/Publications/2016/11/9965/7>

3.1. Do you agree with Lord Bonomy's suggestions which seek to provide greater clarity on the question of whether someone is hunting illegally (by finding ways to clarify the element of intent)?

Please answer Yes or No x

Can you suggest ways in which we might do this?

Please explain your answer

SLE would be concerned about any lowering of the level of mental element and would refer to our earlier response to question 1.2.

#### 4. Vicarious Liability

Please see paragraphs 7.23 to 7.25 of Lord Bonomy's report.

<http://www.gov.scot/Publications/2016/11/9965/7>

4.1. Do you agree that we should explore a new vicarious liability provision whereby a landowner who permits a person or persons to deploy dogs to stalk, search for and flush wild mammals over their land is guilty of an offence in the event that someone involved in such activity commits an offence?

Please answer Yes  or No

Please explain your answer

We strongly disagree with a new provision of "vicarious liability" in this instance in relation to a Landowner and are concerned by the premise of this question given it is only being considered in relation to a landowner, despite the wider context in the report.

It should be noted that at present the Act makes it an offence for an owner or occupier of land knowingly to permit another person to enter or use it to commit an offence and so if the owner conspired with or encouraged this behaviour the law covers this situation.

We should also advise that we accept the legal principle of vicarious liability and agree that landowners can and should be held liable in certain circumstances, in a general sense if they have not taken all due care and attention and instructed the person as to how to behave and obey the law. However, what this proposal appears to be doing is actually making the landowner liable for the actions of a third party irrespective of whether he or she had taken any due care and attention at all. We would suggest that there could well be infringement of a person's legal rights by introduction of such a measure and the human rights aspect of introducing such a provision would need to be fully considered given the potential for challenge to this.

The report itself refers to various forms of vicarious liability within hunts themselves and as stated earlier we are unclear as to why this question relates simply to landowners. This is particularly the case given the practical relationship between landowner and hunt is very distant and does not have any directness or

control which would in any sense make it equitable or practical to impose such liability.

On a very basic level there is not likely to be any employment relationship between the landowner and hunt, indeed landowners may be unaware of a hunt being on their land.

Even with reforms to land registration, it may not be straightforward to identify ownership of land at the relevant point where the alleged offence has been committed and could become extremely bureaucratic, especially where the land is legitimately owned in a trust or other entity.

The situation is also very different to the employ of a gamekeeper by a landowner and the gamekeeper commits an offence, although even in that more direct linked situation there have been very few successful prosecutions. Introducing vicarious liability would be tantamount to a landowner being held liable where a tenant of one of his properties was found to be dealing drugs from the property.

On a practical level it is often essential to have access to fringe or neighbouring land to obtain access to where foxes are prevalent. Fear of potential prosecution could also have a significant impact upon landowners permitting use of land for hunting, which would effectively render the legislation irrelevant and meaningless.

## 5. Burden of Proof

Please see paragraphs 7.27 to 7.39 of Lord Bonomy's report.

<http://www.gov.scot/Publications/2016/11/9965/7>

5.1. Do you agree with the proposition that the onus should lie upon an accused to establish that their conduct falls within one of the exceptions provided in the 2002 Act?

Please answer Yes  or No

Please explain your answer

We do not believe that it was ever the intention of those who proposed this legislation that the onus should lie upon an accused to establish that they were acting within one of the exceptions. While we note that it is difficult for the Crown to prove beyond reasonable doubt that an accused was not acting in accordance with the exception it would be just as difficult for an accused to prove that he was and SLE believe that the fundamental principle that a person is innocent until proven guilty should not be dispensed with lightly.

SLE is concerned about the prospect of vexatious prosecutions being pursued where there was simply an assertion of an offence having been committed and the accused then having to demonstrate that the various relevant conditions of the exemption had been met.

## 6. Time Limit for Prosecution

Please see paragraphs 7.42 to 7.43 of Lord Bonomy's report.

<http://www.gov.scot/Publications/2016/11/9965/7>

6.1. Do you agree with Lord Bonomy's recommendation that the time limit for prosecution under the 2002 Act be extended and harmonised with other statutes which create wildlife offences?

Please answer Yes or No x

Please explain your answer

SLE disagrees with the extension of the time limit for prosecution. In practical terms it would mean that an allegation three years preceding could be brought provided within six months from the date on which sufficient evidence came to the knowledge of the fiscal service. Given the public nature of mounted hunts in particular, it is unclear what type of evidence is envisaged might arise up to three years afterwards.

Extending the time limit could have significant implications on an individual, in terms of ability to change employment and would also potentially reduce the prospects of a fair trial, given the lapse between the events in question and the prosecution.

In terms of problems for policing under the current time limits, there is not any reference to this in the written evidence of the police to Lord Bonomy.

## 7. Any other comments

Please use this space to provide us with any other comments you wish to submit on the use of dogs to stalk, flush or search for wild mammals.

Please explain your answer

In Lord Bonomy's report there were a number of references to the number of guns that should accompany mounted packs and comparison made with the number of guns that accompany both foot packs and hill packs. We feel that this can be best addressed through the production of a Hunting Code of Practice.

